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the other Six Nations could own, use, and enjoy the land, until the Seneca chose to sell it. The Tuscarora were tenants at sufferance of the Seneca, that is, their guests, and their right to the land would have terminated when their host sold the land. There is no reading of the Treaty which could be interpreted to mean that the right to possession or use of the land by the Seneca would continue should they choose to sell it outright. Nor is there any ambiguity which would have led the "guests" to believe their rights to be greater under the Treaty than that of their hosts. The defendant has presented no evidence that the Tuscarora believed any differently at the time of the Treaty. It is only reasonable to conclude that the Tuscarora, having recently been driven from their ancestral home by white settlers and arriving in this State, would certainly be aware that their use and enjoyment of the land was at the sufferance and pleasure of the Seneca, and could be revoked by the Seneca at will.

The defendant would argue that, based upon the development of the law in this area (*Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U. S. 172), the usufructory rights of the Tuscarora would have continued until extinguished by the Tuscarora in another treaty. However, unlike the cited cases, the Tuscarora had no relationship to this land independent of their relationship with the Seneca. The Treaty of 1794 clearly states that this was Seneca land. There is no evidence that the Tuscarora at the time believed their right

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to use of the land would continue if it was sold. They may have expected the land would never be sold by the Seneca, but the Treaty gave them no illusions as to the consequences of a sale.

Neither can it be said that the Native Americans of the time would have thought that an outright sale of the land would not affect their use and enjoyment of the fruits of the land. When the Seneca did sell the land pursuant to the Treaty of Big Tree of 1797, a provision was made as follows: *"Also, excepting and reserving to them, the said parties of the first part and their heirs (the Seneca), the privilege of hunting and fishing on the said tract of land hereby intended to be conveyed."* The Treaty of 1797 was with the Seneca Nation alone. The Seneca knew the necessary language to preserve their hunting and fishing rights and used such language to reserve certain privileges for themselves, but not the other members of the Six Nations.

The court therefore finds that the ruling of the lower court, that the doctrine of conservation necessity was not applicable, was correct as a matter of law.

The defendant also argues in his Affidavit of Errors that the court failed to properly interpret the rules of the State DEC Guidelines. The defendant cites a memorandum of that department which states that "Native Americans fishing off the reservation must comply with all

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laws and regulations regarding seasons, bag limits and size limits.”

However, the context of this memorandum was that the officer of the DEC was addressing the issue of whether Native Americans were required to obtain fishing licenses. The memorandum cited an earlier letter from the Commissioner of the DEC to the Oneida in which Commissioner Jorling wrote “We do not agree, however, that the right to hunt and fish off Reservation lands also conveys the right to do so outside of legally established seasons, bag limits and size limits.”

Taken in this context, it does not appear that the intent in this memorandum was to set as a policy of the DEC that only laws and regulations regarding seasons, bag limits and size limits were to be applied to Native Americans. Such a policy would be contrary to the clear language of 6 N.Y.C.R.R. 10.4 which states that it is applicable to all persons.

The decision of the lower court is affirmed. This constitutes the decision and order of the court.

/s

Hon. Sara S. Sperrazza
Niagara County Court Judge

Entered: /s

**APPENDIX G — LETTER FROM ROBERT J.
BOTZER RE APPEAL TO COUNTY COURT FROM
WILSON TOWN COURT**

Town of Wilson Justice Court
375 Lake Street
P.O. Box 537
Wilson, NY 14172

ROBERT J. BOTZER
Town Justice

716) 751-0549

May 23, 2003

Mr. Robert Graff, Principal Law Clerk
Niagara County Court House
1755 Hawley Street
Lockport, NY 14094

RE: Appeal to County Court from Wilson Town Court
People v. Neil Patterson, Jr.
Docket No. 03020023

Dear Mr. Graff:

In processing the appeal that I have rewritten my notes from the trial that was held on March 26, 2003 (enclosed). Also enclosed are copies of three sheets that officer Lang referenced at trial.

I received the attached Affidavit of Errors on May 21, 2003. In answer to the two issues of errors referenced in the affidavit, I make the following comments:

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- (a) No specific written "Doctrine of Conservation Necessity" was provided to this court at trial. Mr. Patterson's espousal of the doctrine of "Conservation Necessity" raised positions which I felt were not applicable to this case.
- (b) NYCRR 10.4(7) requires all tip ups be marked with the name and address of operator. It is the opinion of this court that Mr. Patterson must comply with this regulation as well as all other rules and regulations while off reservation land, including the "legally established seasons, bag limits, and size limits."

If you require any further information, please do not hesitate to call. My clerk or I can be reached at (716) 751-0549.

Sincerely,

/s

Robert J. Botzer
Town Justice

*Appendix G*Rewritten notes from Trial People Vs. Patterson 03/26/03

Mr. Neil Patterson requested to represent himself. He had no witnesses.

Officer Richard Lang prosecuted for the People.

Both Officer Lang and Mr. Patterson were sworn in and testified under oath.

Officer Lang – Testified that he found an individual in Wilson Tuscarora State Park ice fishing with a tip up lacking name and address on it. This individual also lacked a fishing license but was not issued a ticket because he was an American Indian.

Mr. Patterson – Testified that he is director of the Tuscarora Environment program on the Nation. States he was fishing with 1 tip up and one other line. Nation attorney has informed him that it was argued successfully that the state does not have jurisdiction over aboriginal territory. Conservation law only pertains to off reservation Native Americans when “preserving conservation of resource.”

Officer Lang – Disputes Mr. Patterson’s statement that rules can be broken off the reservation. Once off the reservation the Native American must follow the rules outlined by the April 6, 2002 memo as presented in court. Specifically cited was the last sentence “Native Americans

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hunting and fishing off the reservation are required to comply with all laws and regulations regarding seasons, bag limits and size limits.”

Mr. Patterson – States that the state does have the right but only to “preserving conservation of resource”. He states, “Therefore, this memo backs up my argument”. He states, “There is inconsistent policy with the state”.

Officer Lang – Disagrees – Rules for tip up do include the conservation of resource. It could be used in the illegal taking of the resource (if the name and address were not placed on all the tip ups). Officer Lang asked Mr. Patterson if he had a copy of the New York State Fishing Regulations Guide and he did not. Officer Lang provided copies of the guide to the court and Mr. Patterson. Highlighted the section that states, “All tip ups must be marked with the name and address of the operator.”

Mr. Patterson – Provided the court 3 documents (one appeals court decision and two sections of American Jurisprudence, second edition) outlining the states limitation of power to regulate American Indians’ right to hunt and fish. Mr. Patterson states that this issue is not a violation of any section of Environmental Conservation Law, that his actions were guaranteed by the “Treaty of Canandaigua in 1794”.

Officer Lang – States the law does not discriminate; it is the same for all individuals.

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Decision: Mr. Patterson violated CRR 10.4 Sec. A7 by not having name and address on his tip up.

Fine = \$25.00

Mr. Patterson said he would pay by "next week".
Approved by Wilson Town Court